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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRAVIS WARD,
Petitioner

v.

SENTRY TITLE CO., INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court of Appeals is bound to apply Texas law in a manner which does not conflict with decisions of the state's highest court on matters of substantive law?

2. Whether a Circuit Court of Appeals decision which is in irreconcilable conflict with decisions of a state's highest court on matters of substantive state law involving important public policy should be reversed by this Court?

3. Whether it was permissible for the Circuit Court of Appeals to summarily deny consideration of the most recent Texas Supreme Court decision setting forth the controlling authority relative to the state law issue decided by the Court of Appeals, when that state decision was brought to the attention of the Court prior to issuance of its mandate?

4. Whether the Court of Appeals failed to adequately consider the merits of convening an *en banc* court, and afforded Petitioner due process, since a single judge summarily denied Petitioner's Motion for Leave to File a request for *en banc* rehearing, requested in light of an irreconcilable conflict between the Court of Appeals decision and a subsequent Texas Supreme decision, as well as an irreconcilable conflict with a prior panel decision of the Circuit Court?

5. Whether the United States Supreme Court should exercise its supervisory authority to direct the Circuit Court of Appeals to resolve the irreconcilable conflicts herein?

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OPINIONS BELOW

The opinions of the U.S. Court of Appeals for the Fifth Circuit are reported at 715 F.2d 941 (1983) and 727 F.2d 1368 (1984). (Appendix at A and B).

The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Texas, Dallas Division, are not reported. (Appendix C).

JURISDICTION

This case was removed to the U.S. District Court for the Northern District of Texas pursuant to 28 U.S.C. §§1340 and 1345.

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 26, 1983, and affirmed on March 12, 1984. [hereinafter referred to as decision].

Motion for panel rehearing was denied on July 23, 1984, and Motion for leave to file a request for rehearing *en banc* in light of an intervening decision of the Supreme Court of Texas, was denied on August 30, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Rules of Decision Act, 28 U.S.C. §1652 (1976):

§1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

Rule 35, Federal Rules of Appellate Procedure, 28 U.S.C.

DETERMINATION OF CAUSES BY THE COURT EN BANC

(a)When Hearing or Rehearing in Banc Will Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) *Suggestion of a Party for Hearing or Rehearing in Banc.* A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) *Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate.* If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a hearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979.)

STATEMENT OF THE CASE

The interpleader action in *Harris v. Sentry Title Co., Inc.*[1] was originally filed in the Texas state district court. The case was removed to federal court pursuant to 28 U.S.C. §§1340 and 1345, when the IRS asserted a claim against the interpleader fund, and remained there after the IRS claims were satisfied. The District Court found it would be in the interest of justice to allow the case to remain in federal court rather than delay the litigation further by remanding it to state court.[2]

Upon applying Texas Supreme Court precedent regarding the law of constructive trusts to the undisputed facts in this case, the District Court imposed a constructive trust[3] on the proceeds of the sale of the Dyckman property, the property or transaction over which this dispute arose. The District Court ruling imposing a constructive trust is based on the fact that while the Dyckman property was acquired by Respondent on behalf of Peti-

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[1]715 F.2d 941 (5th Cir. 1983). (Hereinafter referred to as "Sentry Title Company"). The Opinion was reaffirmed at 727 F.2d 1370 (5th Cir. 1984).

[2]715 F.2d at 943, 945.

[3]For constructive trust law on the critical issue in this case, sufficiency of prior fiduciary relationships for purposes of supporting imposition of constructive trusts, see note 4, *infra* and Argument 1.

For general background and policy, however, we would note that where there is a breach of a fiduciary relationship which encompasses the property or proceeds at issue before the Court, the Courts have imposed constructive trusts "...to prevent unjust enrichment obtained through the violation of a fiduciary relationship." *Omohundro v. Matthews*, 341 S.W.2d 401, 407 (Tex.1960). Accord, *Palmer v. Fuqua*, 641 F.2d 1146, 1160 (5th Cir. 1981) (applying Texas law). A breach of such a fiduciary relationship gives rise to a constructive trust irrespective of the Statute of Frauds or pertinent Trust Acts. *Id.;* Accord, Ginter v. Taub, 27 Tex. 5. ct. J. 488, 491 (Tex. July 11, 1984). Thus, a constructive trust will be imposed where "...one party to [a] transaction holds funds which in equity and good conscience should be possessed by another." *Omohundro, supra* at 407. As pertinent to this suit, a constructive trust "...is applicable where one person agrees to purchase property on behalf of another, whether he undertakes to purchase it in the name of the other, or in his own name, or in joint names." *Id.*

Fiduciary relationships sufficient to give rise to a constructive trust may be found in innumerable instances, regardless of whether the fiduciary obligations

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tioner pursuant to an oral agreement, a prior fiduciary relationship existed between the parties regarding land acquisition and the *prior fiduciary relationship encompassed or was thus directly related*[4] *to the Dyckman property.*

Upon appeal to the Court of Appeals for the Fifth Circuit, the Court of Appeals found that the "critical"[5] issue in the case involved the sufficiency of the prior fiduciary relationship for purposes of supporting imposition for a constructive trust. While specifically accepting the District Court findings that a prior fiduciary relationship existed between the parties encompassing or thus *directly related* to the acquisition of the Dyckman property, the Court of Appeals reversed the District Court upon concluding that Texas law requires that a constructive trust must be supported by a prior fiduciary relationship which is separate, independent and *unrelated*[6] to the subject transaction.[7]

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arise from formal arrangements, or informal relationships which are more than arms-length business dealings, and the relationships may be either written or oral. *Palmer v. Fuqua, supra* at 1159, 1160. "The specific instances in which equity impresses a constructive trust are *numberless*,-as numberless as the modes by which property may be obtained through bad faith and unconscientious acts." (Emphasis supplied). *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948). See also, *Omohundro v. Matthews, supra; Fitz-Gerald v. Hull*, 237 S.W.2d 256 (Tex. 1951).

The equitable rationale for imposing a constructive trust is that "[r]esort is had to it in order that a statute enacted for the purpose of preventing fraud [Statute of Frauds] may not be used as an instrument for perpetrating or protecting a fraud." *Pope v. Garrett*, 211 S.W.2d 559, 561 (Tex. 1948).

[4]See generally, District Court Findings of Fact and Conclusions of Law, Appendix C; Accord, *Rankin v. Naftalis*, 557 S.W.2d 949 (Tex. 1976); *Huffington v. Upchurch*, 532 S.W. 2d 576 (Tex. 1976); *Palmer v. Fuqua*, 641 F.2d 1146, 1155-1157, 1160 (5th Cir. 1981)(applying Texas law).

For a graphic illustration of the undisputable fact that the controlling Texas Supreme Court precedent recognizes that where a prior fiduciary relationship encompasses or is directly related to the transaction at issue, it is sufficient to support a constructive trust, please refer to Appendix E.

[5]*Sentry Title Co., supra* 727 F.2d at 1370 (citing *Sentry Title Co., supra* 715 F.2d 946).

[6]*Id.* at 948.

[7]Here the Dyckman acquisition or transaction.

Petitioner respectfully claims that the Court of Appeals decision is hopelessly *irreconcilable with Texas Supreme Court law* regarding prior fiduciary relationships sufficient to support imposition of constructive trusts. Indeed, while Petitioner was not allowed to file a Suggestion for Rehearing *en banc* along with an accompanying brief and graphic illustration of irreconcilable conflict,[8] an intervening Texas Supreme Court decision,[9] *Ginter v. Taub (Taub),* even recently reaffirmed the line of controlling Texas authorities[10] which hold that a prior fiduciary relationship directly related to the subject transaction is sufficient to support imposition of a constructive trust.

Moreover, as discussed below, Petitioner claims that there is *irreconcilable conflict within the Fifth Circuit itself* on this exact issue, since *Palmer v. Fuqua, supra,* is a prior panel decision diametrically opposed to the panel decision herein. In fact, the Fifth Circuit in *Palmer,* specifically relies upon the same line of controlling authorities recently reaffirmed by the Texas Supreme Court in *Taub, supra,* for the proposition that prior fiduciary relationships encompassing or thus directly related to the subject transaction are sufficient to support imposition of constructive trusts.

Finally, in light of the Circuit Court's summary denial of Petitioner's attempts to bring the recent *Taub* decision to the attention of the Court to demonstrate the panel decision's irreconcilable conflict with Texas law as well as with a prior panel decision for purposes of *en banc* rehearing, Petitioner respectfully submits that the Circuit Court's action cannot be reconciled with Supreme Court and Fifth Circuit precedent regarding the appropriateness of *en banc* rehearings, or with the broad concept of due process.

This case thus presents important questions regarding whether a Circuit Court of Appeals is bound to apply state law when an irreconcilable conflict with decisions of the state's highest court as well as prior panel decisions of the Circuit Court itself are plainly demonstrated. Moreover, the case presents important ques-

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[8]See Appendix D, E and F.

[9]See *Ginter v. Taub*, 27 Tex.S.Ct.J. 488 (July 11, 1984).

[10]The *Rankin v. Naftalis*, line of cases, *supra*.

tions regarding the appropriateness of summarily denying *en banc* rehearings, consistent with due process and Supreme Court and Fifth Circuit precedent on *en banc* rehearings, when Petitioner is attempting to bring to the attention of the Court an irreconcilable conflict reaffirmed by a recent State Supreme Court decision.

Petitioner Ward's first Suggestion for *En Banc* Rehearing and Motion for Panel Rehearing were denied on October 26, 1983, followed by the denial on November 6, 1983, of Petitioner's Motion for Stay of Mandate. By its Opinion issued on March 12, 1984, the Court of Appeals recalled the Mandate and remanded to the District Court to make further determinations on the minor issues of the amount of interest due to Respondent and amount of reimbursement to Petitioner for expenditures made in connection with the land acquisition.

On March 24, 1984, Petitioner filed for Writ of Certiorari, and on April 5, 1984, filed a second Petition for Rehearing and Suggestion for *En Banc* Rehearing in the Fifth Circuit Court of Appeals. The Petition for Certiorari was denied on June 4, 1984.[11] On June 21, 1984, the Fifth Circuit denied Petitioner's second Petition for rehearing.

Importantly, on July 18, 1984, counsel for Petitioner became aware of the Opinion issued on July 11, 1984, by the Supreme Court of Texas in the *Taub* case.

Thereupon, Petitioner immediately filed a Motion to Stay or Recall the Mandate before it issued to the District Court along with a request for further briefing and rehearing by the panel. On July 23, 1984, the Order denying Petitioner's Motion to Recall the Mandate was issued.

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[11]As this Court is aware, a denial of certiorari does not reflect on the merits of the case, nor "establish the law of the case or amount to *res judicata* on the points raised." *Hughes Tool Co. v. TransWorld Airlines*, 409 U.S. 363, 365 n. 1 (1972); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-919 (1949).

Moreover, in light of the Motion pending before the Fifth Circuit at the time, Petitioner informed this Court that it appeared inappropriate for the Court to review this case on the merits until the Fifth Circuit disposed of his Motion.

On July 23, 1984, the Mandate was issued and on July 25, 1984, the Mandate and Judgment of the Circuit Court were filed in the District Court.

Thereafter, in a final attempt to bring the irreconcilable conflicts reaffirmed by the recent Texas Supreme Court case to the attention of the *en banc* Court, on August 21, 1984, Petitioner filed a Suggestion for *en banc* Rehearing in Light of Intervening Decision of Supreme Court of Texas along with a Motion for Leave to file the suggestion.

A single judge on the panel herein summarily denied Petitioner's Motion for leave to file request for *en banc* rehearing, and returned the briefs demonstrating irreconcilable conflicts now highlighted due to the recent Texas Supreme case unfiled.[12] See Appendix D, E and F.

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[12]**Importantly, the procedural history of this case is similar in respect to *Wichita Co. v. City Bank*, 306 U.S. 103 (1938), a case, likewise, involving important questions regarding the law of fiduciary relations for commercial transactions in Texas. Significantly, even though as here, the Court of Appeals had denied two rehearings [here three], the Supreme Court granted certiorari on the basis of Erie.**

REASONS FOR GRANTING THE WRIT

1. The Decision Of The Circuit Court Concerning An Important Question of Texas Law Should Be Reversed Since It Is In Irreconcilable Conflict With The Decisions Of The Texas Supreme Court On The Exact Issue.

This case presents the Court with judicial as well as legal policy questions of exceptional public importance.

As will be shown below, the Circuit Court's ruling is in blatant contravention of the federal judicial policy well-established in *Erie*,[13] since it is hopelessly irreconcilable[14] with *Texas Supreme Court precedent*, which holds that a prior fiduciary relationship *directly related* to or thus encompassing the property or transaction at issue before the Court *is sufficient* to support imposition of a constructive trust.[15]

Furthermore, the *Court of Appeals decision* holding that there *must be* a separate and independent prior fiduciary relationship, *unrelated* to the property or transaction at issue before the Court, is extreme in its departure from legal policy and equitable rationale, which has universally recognized the appropriateness of imposing constructive trusts where there is a breach of a prior fiduciary relationship which encompasses the property or transaction at issue before the Court. See e.g., *Robertson v. Chapman*, 152 U.S. 673, 681-682 (1893); *Moore v. Crawford*, 130 U.S.

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[13]*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937).

[14]For a graphic illustration of the irreconcilable conflict between the Court of Appeals decision and Texas Supreme Court cases on the exact issue before the Circuit Court, as well as irreconcilable conflict with a previous Court of Appeals decision applying Texas law to the same issue, please refer to Appendix E.

[15]As specifically stated by the Court of Appeals, the "critical" issue in this case is the question of the sufficiency of prior fiduciary relationships for purposes of supporting imposition of constructive trusts. *Sentry Title Co.*, 727 F.2d at 1370, quoting earlier Opinion, 715 F.2d at 946.

As discussed in detail *infra*, the *Court of Appeals decision* ruling that there *must be* a separate and independent fiduciary relationship *unrelated* to the property or transaction at issue, before recognizing that a constructive trust is appropriate under Texas law, flagrantly conflicts with Texas Supreme Court precedent.

122, 128 (1888); *Palmer v. Fuqua, supra* at 1146, 1160 (5th Cir. 1981); *Rankin v. Naftalis, supra* at 944; *Omohundro v. Matthews, supra* at 407 (Tex. 1960) (extensive analysis of other jurisdictions). Ironically, the decision ignores prior fiduciary relationships relating to the very property or transactions which bring the parties before the Court.

In specifically affirming the District Court findings that the Dyckman acquisition, the transaction at issue, is *directly related* to a prior fiduciary relationship,[16] yet holding that the prior fiduciary relationship thus encompassing the subsequent Dyckman property acquisition is insufficient to support imposition of a constructive trust,[17] the Court of Appeals totally disregards Texas Supreme Court precedent to the contrary.[18]

As the Court is aware, in cases where a *federal court's determination* of a state law issue is *diametrically opposed* to the decisions of a *state's highest court* on that exact issue, this Court has granted certiorari since such judicial conflict raises important questions regarding "the interrelation of state and federal courts." *West v. A.T.&T. Co.*, 311 U.S. 232, 235 (1940); *Wichita Co. v. City Bank, supra* at 107. See, *Six Companies v. Highway District*, 311 U.S. 180, 185 (1940).

Likewise, it is well-settled that where substantive state law is to be applied in federal court, it is the province of state courts to interpret and define the state law which federal courts are bound to apply.[19] *Brady v. Maryland*, 373 U.S. 83, 90 (1963);

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[16]*Sentry Title Co.*, 715 F.2d at 948, 949.

[17]*Id.* at 948.

[18]See e.g., *Rankin v. Naftalis, supra* at 944; *Huffington v. Upchurch*, 532 S.W.2d 576, 578 (Tex. 1976);Accord, *Palmer, supra* (5th circuit applying Texas law).

[19]The state law to be applied is comprised of "the entire body of substantive law governing an identical action in state courts". *Ruhlin v. N.Y. Life Insurance Co.*, 304 U.S. 202, 209 (1938).

The decisions of the Texas Supreme Court consistently enforce imposition of constructive trusts where a prior fiduciary relationship is directly related to the transaction at issue before the court. See, e.g., *Rankin v. Naftalis, supra*

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Huddleston v. Dwyer, 322 U.S. 232, 236 (1944). Adherence to these judicial policies serves to promote the concerns addressed in *Erie* and mandated by the Rules Decision Act, 28 U.S.C. §1652 (1976).

> . . .the obvious purpose. . . is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts. . .

West v. A.T. & T. Co., supra at 236.

Importantly, an examination of the line of Texas Supreme Court decisions providing the controlling standard for determining when a prior fiduciary relationship is sufficient to support imposition of a constructive trust, reveals that the decisions expressly hold that it is appropriate to impose constructive trusts where the tansaction at issue is *directly related* to a prior fiduciary relationship. See, e.g., *Ginter v. Taub,supra*; *Rankin v. Naftalis, supra* at 944; *Huffington v. Upchurch, supra* at 578. As previously stated, this is graphically illustrated for the Court's convenience in Appendix E attached hereto.

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at 944; *Huffington v. Upchurch, supra* at 578; Accord, *Huffington v. Upchurch, 523 S.W.2d 44 (Tex. Civ. App. 1975). See also, Palmer v. Fuqua, supra*, at 1155, 1157-58. As recognized by Judge Will in a strong dissenting opinion:

> The majority also suggest that because the Dyckman acquisition was "directly related" to the parties prior dealings and was not "separate and independent" from those prior dealings, somehow the pre-existing fiduciary relationship will not, under Texas law, support a constructive trust. *I can find no Texas case so holding. (Emphasis supplied).*
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> . . .
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> Moreover, the majority's current insistence that, in order to impose a constructive trust, the prior dealings must have been "*separate*" from the subject transaction is ironic in light of the requirement of Texas law that a constructive trust may *only* be imposed where the subject transaction is *within* the scope of the parties' prior dealings. *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977) (Emphasis supplied by the Court).

Sentry Title Co., 727 F.2d at 1372.

For example, the Texas Supreme Court in *Rankin v. Naftalis*[20] and the line of Texas Supreme Court authorities relied upon therein, expressly hold that it is appropriate to impose constructive trusts where the transaction at issue is *directly related* to a prior fiduciary relationship.

Rankin involved the issue of whether the existence of a prior fiduciary relationship as to a particular oil and gas lease was sufficient to support imposition of a constructive trust as to a subsequent oil and gas lease. In reviewing the agreement relating to the first oil and gas lease the Court found that while:

> the relationship between the two parties in the [first] lease was fiduciary in character, the fiduciary duties extended only to dealings within the scope of the underlying relationship of the parties; joint ventures for the *development of a particular oil and gas lease*. (Emphasis supplied).

Rankin v. Naftalis, supra at 944.

Thus, since the transaction at issue, the subsequent lease, was considered by the Court to be separate, independent, and unrelated to the first lease, the prior fiduciary relationship established by the first lease was not sufficient to support the imposition of a constructive trust as to the transaction in issue, the subsequent lease.

Significantly, however, the Court acknowledged that:

> *Had the alleged impropriety* [as to the subsequent lease] *been within the scope of* these *activities [regarding the prior lease]*. . . a breach of the fiduciary relationship would have occurred and the resulting or *constructive trusts remedy would be imposed.* (Emphasis supplied).

Id.

Clearly, therefore, as emphasized by the Texas Supreme Court in *Rankin*, when the transaction at issue is directly related to a prior fiduciary relationship, and is therefore, within the scope

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[20]Recently reaffirmed by the Texas Supreme Court as controlling on the issue of prior fiduciary relationships sufficient to support imposition of a constructive trust. *Ginter v. Taub, supra* at 491.

of that prior fiduciary relationship, imposition of a constructive trust is warranted.

Importantly, in reaching the above conclusion, the Court in *Rankin* also relied on other cases specifically supporting the imposition of a constructive trust in instances where the transaction at issue was *directly related* to a prior fiduciary relationship.

For example, as pertinent to the instant suit, the Texas Supreme Court distinguished the transaction in *Rankin* from *Huffington v. Upchurch*,[21] on the basis that ". . . [Rankin] is not a case in which the original contract embraced the general business for the continued acquisition of mineral lands. . .", as was the case in *Huffington v. Upchurch. Rankin v. Naftalis, supra* at 943 (citing *Huffington v. Upchurch)*. The Court found that the fiduciary relationships in *Rankin* related only to the development of a particular oil and gas lease.

Huffington v. Upchurch was an action wherein the District Court had imposed a constructive trust in favor of the plaintiff in relation to an agreement for acquisition of mineral lands. In reviewing the lower court deicison,[22] the Texas Supreme Court found that the partnership agreement provided that the parties were *free to conduct* ". . . *any other business transaction not directly related to the business of acquiring mineral leases* and other mineral or royalty interests and the exploration of and production of oil, gas and other minerals. . ." (Emphasis supplied).[23]

Importantly, the Texas Supreme Court further found, however, that the *transaction at issue was directly related to or thus encompassed by the prior fiduciary relationship arising out of the agreement to acquire mineral leases*, holding that "[i]t is undisputed that the Indonesian venture[24] [the transaction at issue before the Court] fell within the nature of the partnership

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[21]532 S.W.2d 576 (Tex. 1976).

[22]523 S.W.2d 44 (Tex.Civ.App. 1975).

[23]*Id.* at 578.

[24]As analogous to the Dyckman transaction herein. As shown below, the Court of Appeals decision found that the "undisputed evidence" shows that the Dyckman transaction fell within the scope of the agreement and fiduciary relationship relating to the acquisition of 490 acres in Tarrant County, Texas. *Sentry Title Co.*, 715 F.2d at 948.

business. . ."[25] The Texas Supreme Court thus affirmed the lower court's imposition of a constructive trust on the basis that the transaction at issue was directly related to and violated the prior fiduciary relationship to acquire mineral lands.[26]

As recently as July 18, 1984, the Texas Supreme Court in *Ginter v. Taub*, and the line of authorities relied upon therein, reaffirmed the fact that Texas law plainly recognizes the appropriateness of imposing a constructive trust where the transaction at issue is *directly related* to a prior fiduciary relationship.

In striking contrast, *an examination of the Court of Appeals decision plainly reveals that the decision is in an irreconcilable conflict with the controlling Texas law.*[27] While specifically recognizing that the Dyckman transaction, the transaction at issue, is *directly related* to a prior fiduciary relationship, the Court of Appeals decision emphatically held that such a fiduciary relationship cannot support imposition of a constructive trust, ruling that there must be a separate and independent fiduciary relationship *unrelated* to the transaction at issue.

To the contrary, the line of authorities cited by *Ginter v. Taub* specifically hold that the subject transaction *must be* within the scope of, or thus, directly related to the prior fiduciary relationship. *Rankin v. Naftalis, supra; Huffington v. Upchurch, supra;* Accord, *Palmer v. Fuqua, supra* at 1155 (Fifth Circuit citing *Rankin*); Accord, *Sentry Title Co.*, 727 F.2d 1368, at 1372 (Dissenting Opinion, Judge Will citing *Rankin* [which is now also cited by *Ginter v. Taub*] for the proposition that the Court of Appeals requirement, that the prior dealings giving rise to the prior fiduciary relationship relied upon must be "separate" from the subject transaction, conflicts with the requirement in *Rankin* that "a constructive trust *may only be imposed when the subject transaction is within the scope of* the parties' *prior dealings.*" *Sentry Title Co., supra* at 1372)[28] (Emphasis supplied).

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[25]Huffington v. Upchurch, supra at 578.

[26]E.g., *Huffington v. Upchurch*, 523 S.W.2d 44 (Tex.Civ.App. 1975).

[27]Please refer to Appendix E attached hereto for a comparison of the Court of Appeals decision to the controlling Texas Supreme Court decisions.

[28]It appears that the Court of Appeals requirement that a sufficient prior

(Continued on next page)

The patent conflicts now reaffirmed by the Texas Supreme Court's decision *Ginter v. Taub* and the authorities cited therein, is best illustrated by the words of the Circuit Court itself. For example, the Circuit Court made the following crucial findings regarding the fact that the transaction at issue is directly related to, or within the scope of, a prior fiduciary relationship:

> The findings of the district court confirm that the *confidential relationship* between Whatley and Ward first *arose* when Ward became interested in the *490 acres*, and that "the *agreement to buy the Dyckman property* was clearly *within the scope of that prior agreement* and made in furtherance of the prior agreement." (Emphasis supplied).
>
> . . .
>
> First, it is clear from the *undisputed evidence* that, the acquisition of the Dyckman tract was part of the overall scheme to acquire the 490 acres. (Emphasis supplied).

Sentry Title Co., 715 F.2d at 948.

> As the facts clearly reveal, the relationship of *trust and confidence* between Ward and Whatley *began with the dealings* relating to Whatley . . . on the *490 acre tract*

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fiduciary relationship must arise from prior dealings which are separate, independent, and unrelated to the subject transaction, stems from a misreading of the language in *Consolidated Gas and Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966), which states that "[f]or a constructive trust to arise there must be a fiduciary relationship before and apart from, the agreement made the basis of the suit." As is evidenced, for example, by *Rankin, supra* at 944, and the Fifth Circuit in *Palmer, supra* at 1155, 1159-1160, two cases which cite *Consolidated Gas*, yet require that the subject transaction ["the agreement made the basis of the suit"] be within the scope of, or thus, directly related to a prior fiduciary relationship, the *Consolidated Gas* language simply means that prior to the agreement, transaction, or dealings made the basis of the suit, [here the Dyckman transaction], there must be prior dealings giving rise to a fiduciary relationship, [here the 490 acre acquisition plan], and in accordance with *Rankin*, the subject transaction or agreement must be within the scope of the prior dealings giving rise to a fiduciary relationship. *Accord, Sentry Title Co.*, 727 F.2d at 1372 (Dissenting Opinion); *Accord, Sentry Title Co.*, 715 F.2d at 954, 956. (Dissenting Opinion); *Accord*, District Court Findings of Fact No. 24, Conclusions of Law No. 7, (Appendix C).

> owned by Tarrant County. Both of *the other [subsequent] real estate dealings* in question are *directly tied into that fundamental transaction*. (Emphasis supplied).

Sentry Title Co., 727 F.2d at 1370.

> *The land deal which is at issue in this case, the Dyckman tract deal, was directly related to the undertaking to purchase the Tarrant County tract*. It is understood between the parties that if Ward could obtain the Dyckman land . . . it might help Ward in his dispute with Tarrant County concerning the bidding on the 490 acre tract. *One could hardly imagine a more close knit relationship between the Dyckman tract deal and the original Tarrant County bidding*. (Emphasis supplied).

Id.

While recognizing the fact, as analogous to the analysis of the above *Ginter, Rankin* and *Huffington* cases, that the prior fiduciary relationship herein is *directly related* to the Dyckman transaction, the Court of Appeals erroneously and emphatically held that a prior fiduciary relationship sufficient to support imposition of a constructive trust must be "*unrelated* to the subject transaction" (Emphasis supplied). *Sentry Title Co.*, 715 F.2d at 948.

In applying Texas law regarding prior fiduciary relationships sufficient to support a constructive trust, under a section of the initial opinion entitled "Constructive Trust-Principles Applied/ A. Prior history of *unrelated dealings*" (Emphasis supplied),[29] the Court of Appeals held that "[t]o show a constructive trust, a plaintiff must first show . . . that the parties had a long-standing[30] *fiduciary* or *confidential, trusting relationship unrelated* to the subject transaction."[31]

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[29] *Id.* at 948.

[30] The long-standing aspect of the first opinion was deemphasized in the second opinion dated March 12, 1984, 727 F.2d at 1369-1370.

[31] *Id.*

Upon acknowledging the "undisputed evidence" that the Dyckman transaction was within the scope of the prior agreement and fiduciary relationship relating to an acquisition plan to acquire 490 acres owned by the Tarrant County Water Board, the Circuit Court, in clear conflict with the above Texas Supreme Court decisions, held as follows:

> It is of *compelling significance* in this case that the dealings between Ward and Whatley were *not prior unrelated dealings* in real property. Rather, they *were all part of a single master plan to acquire the 490 acres.* Ward and Whatley had had no business dealings with each other prior to the arrangements to acquire the 490 acres. The findings of the district court confirm that the *confidential relationship* between Whatley and Ward *first arose* when Ward became interested in the *490 acres*, and that "*the agreement to buy the Dyckman property was clearly within the scope of that prior agreement and made in furtherance of the prior agreement.*" Under such a view, it is clearly erroneous for the district court to suggest[32] that there was any confiential or fiduciary relationship between the two parties before the overall scheme developed. (Emphasis supplied).

Sentry Title Co., 715 F.2d at 948.

The Court further explained its ruling in a subsequent decision issued March 12, 1984, stating that:

> . . .there *must be a pre-existing confidential relationship* of trust and confidence between the parties *before the dealings which give rise to a constructive trust.* There was no such pre-existing relationship in this case. As the facts clearly reveal, *the relationship of trust and confidence* between Ward and Whatley *began with the dealings relating to. . . the 490 acre tract* owned by Tarrant County. Both of the *other[subsequent] real estate dealings in question* are *directly tied* into that fun-

[32]We would note that the District Court did not make such suggestion. See generally, District Court Finding of Fact No. 24 and Conclusion of Law No. 7. (Appendix C).

> damental transaction. They are *not separate and independent dealings*. (Emphasis supplied).
>
> . . .
>
> *The Tarrant County land deal cannot serve to establish a pre-existing relationship for the Dyckman land deal.* (Emphasis supplied).
>
> . . .
>
> . . .*since it [the Dyckman transaction] was not based upon a pre-existing confidential relationship* involving *separate and independent relations* between the parties, *the Statute of Frauds applied with full force* to that deal, and no constructive trust could be created. (Emphasis supplied).

Sentry Title Co., 727 F.2d at 1370.

Importantly, the *irreconcilable conflict between the Court of Appeals decision and the Texas Supreme Court decision is best illustrated by an application of the legal standard imposed by the Circuit Court decision to the controlling Texas Supreme Court precedents.*" The irreconcilable conflict is plainly demonstrated by such an application since it *yields a legal conclusion diametrically opposed* to the conclusion arrived at in the Texas cases.

For example, unlike the Texas Supreme Court in *Rankin v. Naftalis, supra*, wherein the Court refused to impose a constructive trust because the prior fiduciary relationship was *unrelated* to the subject transaction, application of the Fifth Circuit standard requiring that the prior fiduciary relationship be unrelated to the subject transaction would result in imposition of a constructive trust.[34]

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[33]See also graphic illustration of irreconcilable conflicts at Appendix E.

[34]Importantly, we would note that even though the prior unrelated fiduciary relationship in *Rankin* involved dealings of the "the same general nature or scope as the subject transaction," *Sentry Title Co.*, 715 F.2d at 948, the Texas Supreme Court in *Rankin* held that such a prior fiduciary relationship would not support a constructive trust under Texas law. As previously discussed, the case held that a prior fiduciary relationship in a mineral lease transaction could not support a constructive trust on a subsequent mineral lease transaction, since

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Likewise, contrary to the Texas Supreme Court ruling in *Huffington v. Upchurch, supra*, wherein the Court imposed a constructive trust because the prior fiduciary relationship was *directly related* to the subject transaction, application of the Fifth Circuit standard requiring that the prior fiduciary relationship be unrelated to the subject transaction would result in a refusal to impose a constructive trust.

Importantly, the *egregious conflict* demonstrated herein is *exacerbated*, creating an even greater degree of confusion[35] *due to a glaring intracircuit conflict*[36] between the prior Fifth Circuit decision in *Palmer v. Fuqua*[37] and the panel herein on the same issue.

A review of *Palmer v. Fuqua*, a prior Fifth Circuit panel decision applying the Texas law on prior fiduciary relationships sufficient to support imposition of constructive trusts, reveals that the *Palmer* decision is consistent with, and indeed, relies upon the line of Texas Supreme Court cases recently set forth as controlling by the Texas Supreme Court in *Ginter v. Taub*. The panel decision in *Palmer* thus directly conflicts with the panel decision herein.

The *irreconcilable conflict between the panel decision in Palmer and the panel decision herein*, is similarly *best illustrated by an*

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the *subsequent transaction in that case* was *not* directly related to, or thus *encompassed by the prior fiduciary relationship* pertaining to the particular prior mineral lease transaction in that case.

[35]In fact, creating not only one set of rules to be applied in the state courts and another in the federal courts, but rather, two conflicting rules in the federal courts.

[36]We would note that prior to the 1980 revision of this Court's rules, intracircuit conflict itself could justify review by certiorari. *CAB v. Transworld Airlines*, 344 U.S. 4, 5 (1952); *Dickinson v. Petroleum Corp.*, 338 U.S. 507, 508 (1949); *U.S. ex rel Robinson v. Johnston*, 316 U.S. 649 (1941); *John Hancock Insurance Co. v. Bartels*, 308 U.S. 180, 181 (1939). Despite the revisions, however, intracircuit conflict along with other independent grounds such as those presented herein, can still be considered in reviewing petitions for certiorari. 12 Moore's §817.27, at SC 17-33.

[37]641 F.2d 1146 (5th Cir. 1981).

application of the legal standard imposed by the panel decision herein in Sentry Title Co. to the facts in Palmer.

As previously discussed, the Sentry Title Co. decision herein held that there must be a prior fiduciary relationship which is separate, independent, and unrelated to the transaction at issue before it is appropriate to impose a constructive trust.

Importantly, an *application of this legal standard to the facts in Palmer yields a result directly contrary to the panel decision in Palmer* which recognized the appropriateness of imposing a constructive trust.

Palmer v. Fuqua involved an attempt by the plaintiff to impose a constructive trust on the acquisition of an oil and gas lease, the Ritchie lease. The Court found that there was a prior relationship existing between the parties which was fiduciary in nature,[38] but stated that the question remained:

> . . .whether the Ritchie lease fell within the scope of their fiduciary relaionship.

Palmer, supra at 1155.

In finding that the original agreement giving rise to the prior fiduciary relationship ". . .embraced the [subsequent] acquisition of the Ritchie lease", the transaction at issue before the Court, the panel concluded that it was appropriate to impose a constructive trust. *Id.* at 1157-1158. The panel thus, plainly imposed a constructive trust in a matter where the transaction in issue was directly related to or within the scope of a prior fiduciary relationship.

Importantly, however, application of the standard utilized in the panel decision herein in *Sentry Title Co.*, to the *Palmer* case, would give rise to an entirely different conclusion by the Court. In finding that the original agreement ". . .embraced the acquisition of the Ritchie lease", the panel decision herein would clear-

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[38]The prior fiduciary relationship in *Palmer* arose out of a partnership agreement.

As pertinent to this suit we would note that, as previously discussed, the panel decision accepted the fact that there was a fiduciary relationship existing regarding the acquisition of 490 acres and that the subsequent Dyckman acquisition was within the scope of that fiduciary relationship.

ly conclude that it is inappropriate to impose a constructive trust since it would not be supported by a separate and independent fiduciary relationship unrelated to the transaction at issue.

Indeed, the panel decision herein, as in *Palmer*, recognized that:

> the *confidential relationship* between Whatley and Ward first *arose* when Ward became interested in the *490 acres* [the Tarrant County land deal] and that the *"agreement to buy the Dyckman property* [the agreement made the basis of this suit] was *clearly within the scope of that prior agreement* and made in furtherance of the prior agreement." (Emphasis supplied).

Sentry Title Co., supra at 948.

Contrary to *Palmer*, however, the panel decision concluded that:

> . . .there must be a pre-existing confidential relationship of trust and confidence between the parties before the dealings which give rise to a constructive trust. There was no such pre-existing relationship in this case. As the facts clearly reveal, the relationship of trust and confidence between Ward and Whatley began with the dealings relating to . . . the 490 acre tract owned by Tarrant County. Both of the other real estate dealings in question are directly tied into that fundamental transaction. They are *not separate and independent dealings.*
>
> . . .
>
> *The Tarrant County land deal cannot serve to establish a pre-existing relationship for the Dyckman land deal.*
>
> . . .
>
> *. . .since it [the Dyckman transaction] was not based upon a pre-existing confidential relationship involving separate and independent relations between the parties, the Statute of Frauds applied with full force to that deal, and no constructive trust could be created.*

727 F.2d at 1370. (Emphasis supplied)

Finally, as consistent with the controlling *Ginter v. Taub* line of cases on the sufficiency of prior fiduciary relationships, we would note that the panel in *Palmer* even specifically relied on *Huffington v. Upchurch* and *Rankin v. Naftalis*, for the proposition that a prior fiduciary relationship directly related to the transaction at issue is sufficient to support imposition of a constructive trust.

For example, as pertinent to the panel's reliance on *Rankin*, the Court stated that:

> It is clear then that the *relationship between* Palmer and J. B. Fuqua *was fiduciary* in nature-the *question remains, however, whether the Ritchie lease fell within the scope of their fiduciary relationship. It is only if* the alleged impropriety was *"within the scope of the underlying relationship* of the parties" *that there is a breach of fiduciary duty justifying* the imposition of a *constructive trust. Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977). (Emphasis supplied).

Palmer, supra at 1155.

Likewise, in stating that the case in *Palmer* was very similar to *Huffington v. Upchurch, supra*, the panel in *Palmer* found that:

> The Texas Supreme Court later characterized the *Huffington* case as one "in which the original contract embraced the general business for the continued acquisition of mineral lands." *Rankin*, 557 S.W.2d at 943. In the instant case, the original contract embraced the acquisition of property within the area of interest owned by the partnership. Thus, the original contract embraced the acquisition of the Ritchie lease.
>
> . . .
>
> Just like the improper acquisition in *Huffington*, the venture in the instant case-the acquisition of the Ritchie lease-fell within the nature of the partnership business. . . And just as the imposition of the constructive trust was proper there, it is also proper here.
>
> *Palmer, supra* at 1155-1160.

The panel concluded that "*[a]s long as a fiduciary relationship which encompasses the property at issue is established, a constructive trust may be imposed irrespective of a failure to meet the requirements of the Statute of Frauds.*"[39] *Id.* at 1160. (Emphasis supplied).

In addition to the irreconcilable conflicts in federal and state judicial policy and, indeed, in Fifth Circuit policy itself set out above, we would note that the Court of Appeals decision is far-reaching in its negative impact on Texas commercial transactions and institutions.[40]

To understand the far-reaching implications of the panel decision, one must look only as far as the innumerable types of instances where irrespective of formalized written agreements, Courts have recognized that the relationships between parties are fiduciary in nature, as opposed to arms-length. The Courts have asserted that "[i]t is impossible to give a definition to the term [fiduciary] that is comprehensive enough to cover all cases."[41] Moreover, it is important to note that contrary to the *Sentry Title Co.* panel's restrictive definition of sufficient prior fiduciary relationships to support imposition of a constructive trust ". . . the courts are careful not to limit the rule [constructive trust] or the scope of it's application by a narrow definition of fiduciary or confidential relationships protected by it." *Fitzgerald v. Hull, supra* at 261. (Emphasis supplied by the court).

Upon reviewing the innumerable instances where the Courts have recognized equitable rights for fiduciary relationships relating to the transaction at issue before the Court, the far-reaching impact of the Circuit Court's ruling refusing to recognize equitable rights unless a prior fiduciary relationship regarding

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[39]Importantly, we would note that the *Palmer* panel's application of the Statute of Frauds here is *diametrically opposed* to *Sentry Title Co.* panel's application of the Statute of Frauds. See Sentry Title Co., supra, 727 F.2d at 1370.

[40]We would note that the severe concerns of the real estate as well as the oil and gas industries were evidenced before the Circuit Court through the *amicus* briefs filed by Greater Dallas Board of Realtors, Inc. and Texas Independent Producers and Royalty Owners Association.

[41]*Gaines v. Hamman*, 358 S.W.2d 557, 561 n. 3 (Tex. 1962), citing *Cartwright v. Minton*, 318 S.W.2d 449 (Tex.Civ.App. 1958).

a prior *unrelated* transaction is proved, becomes strikingly apparent.

Quite obviously, the effect of such a decision is to formulate an unprecedented policy which would allow individuals to violate a fiduciary relationship relating to the very transaction which brings the parties before the Court, if there have been no prior fiduciary dealings with the unfaithful fiduciary on matters unrelated to the transaction at issue before the Court. Conversely, is it logical to impose a constructive trust on a particular transaction when the prior fiduciary relationship referred to between the parties has no relation to and thus does not encompass the property or transaction at issue?

Clearly, such a policy ignoring the equitable rights associated with the very transaction before the Court is unsound in equitable policy and logic.

In all due respect, it is difficult to imagine a more illogical or damaging policy than that adopted by the Circuit Court, when one considers the well-established proposition that the Courts have recognized equitable rights associated with breaches of fiduciary relationships under broad, as opposed to narrow standards, to assure that unconscionable wrongs do not go unredressed in light of unenforceable legal rights.[42] Indeed, such equitable policy is recognized to assure that statutes or legal policy designed to prevent fraud do not under the circumstances, assist in perpetrating a fraud or unconscionable result.

Imagine the far-reaching implications this decision will have when potentially disloyal or dishonest fiduciary business associates learn that in light of this decision, they are not required to honor fiduciary relationships pertaining to certain property or proceeds, if there is no fiduciary relationship as to a prior transaction unrelated to the transaction at issue. Such circumstances will plainly arise. Under transactions giving rise to the equitable right of constructive trust, fiduciaries may be dealing with one another regarding certain property or proceeds for the first time in a fiduciary relationship with no prior unrelated fiduciary transactions.

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[42] *Fitz-Gerald v. Hull*, *supra* at 261, cited with approval in *Palmer v. Fuqua*, *supra* at 1155; *Consolidated Gas & Equipment Co. v. Thompson*, *supra* at 333, 336 (Tex. 1966).

With all due respect, can this Court condone a federal decision which is in irreconcilable conflict with important state legal policy and which stands for the proposition that the first time out as a fiduciary doesn't count?

2. At a Minimum, This Court Should Exercise Its Supervisory Authority to Direct the Circuit Court of Appeals to Resolve the Irreconcilable Conflicts Herein.

Petitioner respectfully submits that at a minimum, this Court should exercise its broad supervisory authority to direct the Circuit Court to resolve the confusion and injustice brought about by the irreconcilable conflicts herein.

The broad supervisory authority of this Court is well-established:

> this Court has power not only to correct errors in the judgment entered below, but, in the exercise of its appellate jurisdiction, to make such disposition of the case as justice may now require.

Dorchy v. Kansas, 264 U.S. 286, 289 (1923).

> Our supervisory appellate jurisdiction would be of little value if the injustice caused by the decision below were to stand uncorrected. We are not so constricted.

Defense Corp. v. Lawrence Co., 336 U.S. 631, 639 (1948).

As pertinent to this case, this Court has in past instances remanded cases to the Court of Appeals where an intervening state court decision relevant to ". . . an issue critical[43] to Petitioner's claims",[44] requires consideration. *Mills v. Rogers,* 102 5.CT. 2442, at 2452 (1982); *Lehman Brothers v. Schein*, 416 U.S. 386 (1973); *Nolan v. Transocean Airlines,* 365 U.S. 293, 295 (1961).

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[43]As previously noted, the Court of Appeals specifically stated that the issue regarding the sufficiency of prior fiduciary relationships is the "critical" issue in this case. *Sentry Title Co., 727 F.2d at 1369-1370. (quoting first opinion, 715 F.2d at 946).*

[44]Nolan v. Transocean Air Lines, 365 U.S. 293, 295 (1960); See also, *Mills v. Rogers*, 102 S.Ct. 2442, 2452 (1982).

As previously discussed, the Supreme Court of Texas recently reaffirmed *Rankin v. Naftalis* and the line of authorities cited therein as the controlling law of Texas on the issue of prior fiduciary relationships sufficient to support imposition of constructive trusts.

Likewise, as previously noted, Petitioner exhausted every available avenue in his attempt to bring the recent case and its impact on the Court of Appeals decision to the attention of the Circuit Court. Nevertheless, the Court of Appeals summarily denied a panel rehearing and permission to brief the impact of the intervening state court decision, and summarily denied Petitioner's request for permission to file a Suggestion for Rehearing En Banc along with accompanying briefs.

Thus, as in *Nolan v. Transocean Airlines, supra*, this Court is warranted in at least remanding the case to the Court of Appeals for further consideration:

> Inasmuch as the view expressed therein [in the intervening state court decision] by the highest court of California may be decisive of an issue, *critical* to petitioner's claims, and inasmuch as the Court of Appeals for the Second Circuit is charged with mandatory appellate review in the present case, that Court should decide what relative weights as authoritative sources for ascertaining California law [the intervening state court decision has]." (Emphasis supplied).

Id. at 295-296.

Importantly, even aside from the above precedent justifying the exercise of this Court's broad supervisory authority, Petitioner respectfully submits that contrary to prior rulings of this Court regarding *en banc* review, the Court of Appeals has failed to even consider the merits of Petitioner's *en banc* request. The single judge ruling denying Petitioner's request for permission to file an en banc request along with a supporting brief, therefore demands close scrutiny by this Court. See Appendix D, E and F.

As this Court ruled in the *Western Pacific Railroad Case*:

> It should also be decided whether the en banc issue has been adequately treated by the Court of Appeals. A

> review of the proceedings below convinces us that further consideration by that court is appropriate [where it appeared that the appellate court refused completely to consider the merits of the en banc request].

345 U.S. 247, 263-265 (1952)

As the Court is aware:

> . . . [en banc courts] make for more effective judicial administration. Conflicts within the circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted.

Textile Mills Corp. v. Commissioner, 314 U.S. 326 (1941).

> The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court. Without the procedure in banc it would be possible for different panels of the court to reach and apply in individual cases *diametrically opposite conclusions upon important questions of law or practice*. Not only would this confuse the law but it might also result in serious strains in the court when subsequently a panel of judges who individually disagreed with one of these decisions was called upon to decide the same question in a later case. (Emphasis supplied).

Maris, "Hearing and Rehearing Cases In Banc", 41 F.R.D. 91, 96.

Moreover, review by the Court of Appeals en banc is "especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases." *U.S. v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1959). In light of the policies and objectives achieved by convening an *en banc* court in appropriate cases, this Court has cautioned that:

> *A court may take steps to use the en banc power sparingly, but it may not take steps to curtail its use indiscriminately.* (Emphasis supplied).

Western Pacific Railroad Case, supra at 261.

As pertinent to this case, while the Court of Appeals refused to even consider the merits of Petitioner's request for an *en banc* review, had Petitioner been allowed to file his Suggestion for En Banc Review (See Appendix F)[45] the Court would have been presented with sufficient grounds warranting *en banc* review, as evidenced by its own Internal Operating Procedures.

> A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent setting error of exceptional public importance or an opinion which *directly conflicts with prior Supreme Court or Fifth Circuit precedent*. (Emphasis supplied).

IOP 6 at FRAP 35.

Indeed, Fifth Circuit precedent specifically holds that where a panel decision is in apparent conflict with a prior panel decision, and the decision cannot be justified on the basis of a subsequent change in state law, *en banc* review is required to resolve the conflict or confusion resulting from the decision.[46] Moreover, the rule that one panel cannot overrule another panel, and that *en banc* review must be conducted to resolve conflicts, "applies with equal force to cases in which state law supplies the substantive rule of decision . . ." *Broussard, supra* at 1389. Likewise, in any event, FRAP 35 mandates that conflicts with U.S. Supreme Court precedent such as *Erie* are matters for *en banc* review. *Id.*

Accordingly, Petitioner respectfully submits in light of the irreconcilable conflicts demonstrated herein, as well as in Peti-

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[45]The attached Suggestion for *En Banc* brief was returned unfiled. See Appendix D and F.

[46]Edwards Co., Inc. v. Monogram Industries, Inc., No. 82-2019 (5th Cir. 1984); Broussard v. Southern Pacific Transportation Co., 665 F.2d 1387, 1389-1390 (5th Cir. 1982).

tioner's Suggestion for En Banc Rehearing,[47] exercise of this Court's supervisory authority is clearly warranted.

Importantly, we would note that even aside from the above departure from established judicial policy and federal procedure, as well the departure from universally accepted equitable policy regarding fiduciary relationships, *there is a serious due process question raised herein* which likewise merits the Court's attention. In all due respect, Petitioner submits that it is difficult to reconcile the broad concept of due process with the fact that he was accorded summary denial of an attempt to bring a recent Texas Supreme Court case[48] to the attention of the Court of Appeals. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 483, (1981); *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1980).

In light of the irreconcilable conflicts demonstrated herein, Petitioner, in all due respect, submits that summary denial of his attempts to bring the merits of the above Motion to the attention of the Court of Appeals is hardly consistent with this Court's recognition that:

> . . . a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.

Carey v. Piphus, 435 U.S. 247, 262 (1977).

In conclusion, Petitioner respectfully requests that in the interest of justice this Court should, at a minimum, exercise its broad supervisory authority to pierce the shroud of inequity that overshadows the Circuit Court's decision. As most aptly stated by Judge Will in his strong exception to the majority's opinion:

> . . . the basic error of the majority holding remains uncorrected. A man who admittedly breached his fiduciary duty is still to be rewarded by receiving what

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[47]Which likewise included a graphic illustration of the irreconcilable conflict herein. (See Appendix E).

[48]Along with a comprehensive brief and graphic illustration demonstrating irreconcilable conflict. (See Appendix E and F).

> now appears to be in excess of [$800,000][49] when neither the uncontested facts nor the Texas [or Fifth Circuit] law justify, much less require, such an unjust and inequitable result.
>
> . . .

Sentry Title Co., 727 F.2d at 1373.

> . . .
>
> I cannot in good conscience join in a decision which will reward perfidy and breach of trust with more than [$800,000], an amount which, even in Texas, must be substantial.

Sentry Title Co., 715 F.2d at 961.

CONCLUSION

In the interest of justice and promoting a system of "cooperative judicial federalism"[50] Petitioner respectfully requests that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Hiram C. Eastland, Jr.

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(Counsel for Petitioner)

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[49]Now in excess of $800,000.

[50]Bellotti v. Baird, 428 U.S. 132, 151 (1975).

CERTIFICATE OF SERVICE

I, Hiram C. Eastland, Jr., one of the attorneys for Petitioner herein, am a member of the bar of the Supreme Court of the United States, hereby certify that on the 29th day of September 1984, I served a true and correct copy of Petitioner's foregoing Petition for a Writ Certiorari on the several parties hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

1. J. Albert Kroemer, Esq.
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   Texas Independent Producers and
   Royalty Owners Association.

I further certify that all parties required to be served have been served.

Hiram C. Eastland, JR.

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